

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-6078

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LILLIAN GOLDBERG,

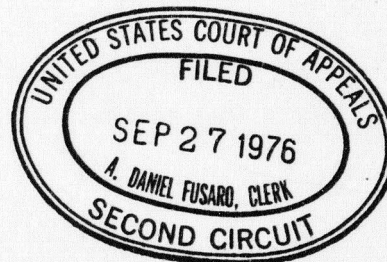
Appellant,

- against -

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Appellee.
-----X

APPELLANT'S REPLY BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Appellant,	:	
	:	
- against -	:	Docket No. 76-6078
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Health, Education and Welfare,	:	
	:	
Appellee.	:	
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PRELIMINARY STATEMENT

Appellant (hereinafter plaintiff), LILLIAN GOLDBERG, filed her brief in this Court in July, 1976. Appellee (hereinafter defendant), filed his brief in August, 1976. This brief is filed in reply to defendant's brief.

POINT I.

DEFENDANT'S ARGUMENTS ARE EITHER
INAPPOSITE OR INCORRECT WITH RESPECT TO
THE ISSUES BEFORE THIS COURT

(a) Estoppel

Plaintiff's argument that defendant should be estopped from denying to continue to pay her Social Security benefits at a reduced rate is set forth at pp. 5-11 of plaintiff's brief, previously filed with this Court.

It is defendant's contention that, for a number of reasons, estoppel may not be invoked in this case. Initial reliance for this position is placed on Terrel v. Finch, 302 F.Supp. 1063 (D. Tex. 1969) and Flamm v. Ribocoff, 203 F.Supp. 507 (S.D.N.Y. 1961) (see defendant's brief at 4-5). Both are distinguishable from the case at bar. In Terrell, plaintiff had merely filed an application for widow's benefits which was denied due to her remarriage prior to age 60. There, plaintiff had not been receiving benefits so no termination of benefits was effected as it was here. In that case, the government would have had to first certify payments to a woman already remarried and not dependent on them. In this case, the plaintiff had been granted her benefits a considerable time before her remarriage and having received the benefits, had arranged her life-style

dependent on them. See Crumpler v. Board of Administration of the Employment Retirement System, 108 Cal. Rptr. 293 (Cal. App. 1973). Flamm, supra, is distinguishable on a number of grounds. In the first instance, the sole issue was one of retroactive benefits which were foreclosed based on the late filing of an application. While the application itself was granted and prospective benefits were paid, certain retroactive benefits were not. Such a situation is hardly equivalent to plaintiff's predicament of loss of all future benefits. Secondly, Flamm was decided in 1961 and bases its opinion on Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). As was noted at page 6 of plaintiff's first brief to this Court, the standard set forth in Merrill is no longer applicable. (cf. Corniel-Rodriguez v. I.N.S., 532 F.2d 301, 305, n. 15 (2d Cir. 1976) citing Moser v. United States, 341 U.S. 41 (1951)).

Defendant's attempt to undermine plaintiff's position as set forth at page 4, n. 4 of defendant's brief also cannot pass muster. The Administrative Law Judge in his opinion denying plaintiff's claim gave:

full credence to her testimony that she did consult the local Social Security office prior to her marriage and that she was misinformed as to the effect of her contemplated nuptial arrangements upon the benefits she was receiving. (A-9)

It is clearly subsumed in this finding that plaintiff accurately portrayed her situation when she consulted Social Security.

Second, in plaintiff's Statement Pursuant to Rule 9(g) of the General Rules of the Eastern District in support of her motion for summary judgment, ¶3 thereof, plaintiff stated:

Sometime before May 21, 1972, plaintiff contacted the local Social Security office by phone, concerned about the effect of her contemplated remarriage on her eligibility for future widow's disability benefits and at that time was misinformed as to such effects. (See Record on Appeal).

Rule 9(g) requires that:

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.*

All material facts set forth in that statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Defendant contested none of the facts set forth in plaintiff's 9(g) statement. In light of this and the finding of the Administrative Law Judge, defendant cannot now be heard to challenge the factual basis of plaintiff's claim.

*That no trial is permitted in this type of case is of no significance here.

(b) Constitutionality

Defendant's contention that the attacked statute is, in fact, constitutional (see defendant's brief, pp. 7 - 12) completely misconstrues or ignores plaintiff's arguments. Defendant divides the argument into two issues -- marital status and age -- and attempts to show that the statute passes muster on each ground individually and, thus, is constitutional.

While this is not conceded (see plaintiff's brief, p. 18, n.*), it is plaintiff's primary position that it is the intermingling of criteria -- age and marital status -- which gives rise to an unconstitutional secondary characteristic -- the age of remarriage. Defendant totally fails to meet this argument in his brief. In this respect, the Court's attention is respectfully referred to plaintiff's brief, pp. 12-17.

Further, both defendant (Defendant's brief, p. 8, n. 6) and the district court (SA-11*) assert that plaintiff lacks the requisite standing to attack the statute as it relates to widow's disability benefits. The reason advanced for this is that while technically plaintiff's benefits should have been discontinued upon her remarriage, plaintiff received benefits until her sixtieth birthday (at which time widow's disability benefits cease) because of a delay in administrative processing. The Social Security Administration did not seek to recoup the overpayment since it was deemed to have been

*This reference is to the Supplemental Appendix found at the end of defendant's brief.

made without fault on the plaintiff's part. The issue is therefore reduced, according to defendant, to whether or not Congress may set an age limit for widow's benefits, i.e., should a widow be eligible for widow's benefits regardless of age?

Such an argument ignores the actual circumstances of this case. Not only could plaintiff have lost her widow's disability benefits for the period between her remarriage and her attaining age 60*, she did lose the right to have those benefits at age 60. If, in fact, the statute (as plaintiff maintains it should) allowed disabled widows to remarry with only a reduction in benefits, such benefits would be converted to aged widow's benefits at age 60. Plaintiff's argument therefore involves only women actually receiving widow's disability benefits, not simply any widow.**

Finally, defendant asserts that what plaintiff actually seeks is a case-to-case determination based upon need (see defendant's brief, p. 10). Plaintiff seeks nothing of the kind. The need of disabled widows has already been found

*That the benefits were, in fact, paid was merely fortuitous and is of no moment here.

**Defendant's argument (at p. 9 of defendant's brief) that were plaintiff to prevail, even a woman widowed at age 30 would be entitled to benefits is, thus absurd.

to be as serious as that of aged widows. Senate Finance Committee, U.S. Code Cong. & Admin. News (1967), p. 2878. Plaintiff simply asserts her constitutional right to be afforded due process and equal protection of the law.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be reversed and appellant should be granted benefits retroactive to the date of discontinuance in the appropriate amount.

DATED: New York, New York
September 24, 1976

Respectfully submitted,

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